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IN THE

SUPREME COURT OF THE UNITED STATES.

[No. 120.]

JOHN A. ALLEN, *Administrator of the Estate of Charles J. Lund, Plaintiff in Error,*

vs.

THE CITY OF LOUISIANA, *Defendant in Error.*

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

BRIEF FOR DEFENDANT IN ERROR.

JAMES O. BROADHEAD,
Attorney for Defendant in Error.

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This suit was instituted on seventy-nine coupons of $80 each, detached from certain bonds, of one of which the following is a copy:

Know all Men by these Presents: That the City of Louisiana, in the State of Missouri, is indebted to ————————, or bearer, in the sum of one thousand dollars, lawful money of the United States of America, which the said City of Louisiana promises to pay on the 2d day of October, 1891, at the Treasurer's office in the City of Louisiana, Mo., with

interest thereon at the rate of eight per cent. per annum, payable annually on the first day of January in each year, upon presentation and surrender of the annexed coupons, as they severally become due and payable. This bond is issued by the City of Louisiana, under authority of the General Assembly of the State of Missouri, entitled "An Act to Amend and Reduce into One the Several Acts Incorporating the City of Louisiana," approved March 25, 1870; also, an ordinance of the City Council of the City of Louisiana, No. 628 passed, September 26, 1870.

In witness whereof, the City of Louisiana has caused its seal to be hereto affixed, and the same to be signed by the Mayor, and countersigned by the Clerk of the City Council, at City of Louisiana, Mo., the 4th day of November, in the year of our Lord, eighteen hundred and seventy-one.

[SEAL] WM. PARKER,
Mayor of City of Louisiana.

Countersigned, N. H. GRIFFITH,
Clerk City Council.

The Act of the Legislature of Missouri referred to in the said bonds, and under the authority of which the bonds purport to have been issued, is entitled an "Act to Amend an Act entitled 'An Act to Amend and Reduce into One the Several Acts Incorporating the Town of Louisiana and to Organize the same into a City,' approved March 14th, 1849, and the several Acts amendatory thereof, said Act, when amended, shall read as follows: approved March 12, 1870," was in evidence and relied on by both parties. Session Acts 1870, page 386. Sections 8 and 9 of the III Article of said Act are in these words:

"SECTION 8. The bonded or funded debt of the city for all purposes, including one hundred thousand dollars subscribed (or to be lawfully subscribed), to railroads terminating at or passing through the City of Louisiana, shall not exceed the sum of two hundred thousand dollars: provided, however, that said debt may be increased to a sum not exceeding two hundred and fifty thousand dollars in all,

by ordinance or ordinances properly passed and submitted to an election under the authority of the City Council of all resident tax-payers of the city, that is to say, of all adult persons who shall have been assessed and actually paid a tax on real or personal property for the year, or the year previous to the year in which such election shall be held; and at such election the judges holding the same shall require proof of the payment of such tax before recording the vote of any person offering to vote at such election, and a majority of all the legal votes cast at said election shall determine the question for or against such ordinance.

"SEC. 9. The city shall have power to subscribe for stock in any incorporated company connecting with the City of Louisiana, or give a bonus to any institution of learning by submitting an ordinance making the appropriation or authorizing the issue of bonds for any such purpose to a vote of the qualified voters, as provided by section 8, of the city, at any general election held in the city, or any special election expressly ordered, at which election a majority of the votes cast shall be for such ordinance."

Section 14 of Article VII of said Act is in the following words:

"The city shall not at any time become a subscriber for any stock in any corporation, except as authorized by this or some other Act of the General Assembly, but said city may by ordinance appropriate money to aid in opening any road leading to the city, or in other improvements within the city, or in building any bridge within two miles of the city, and which may be deemed of general public benefit to the inhabitants of the city; provided, however, that no appropriation shall be made for any improvement beyond the limits of the city, unless a vote be taken on such appropriation at some general or special election ordered for that purpose, and a majority of all votes polled be cast in favor of that appropriation."

These were the only sections of the Act of the Legislature incorporating the City of Louisiana, referred to and re-

lied upon in the court below in support of the authority to issue the bonds, as will be seen by reference to page 35 of the transcript in this case.

The plaintiff also read in evidence Ordinances No. 621 and 628 [see pages 31 and 32 of the transcript], being the ordinance authorizing an election to be held to test the sense of the voters on the question of issuing the bonds and subscribing for stock in the railroad; and the other ordinance, authorizing a subscription to the stock of the Quincy, Alton & St. Louis R. R. Co., and the issuing of the bonds in question to pay for said subsubscription. This railroad company was an Illinois corporation, the Eastern terminus of whose road was on the bank of the Mississippi River, in the State of Illinois, opposite the City of Louisiana. It appeared from the evidence that at the election, held under said Ordinance, three hundred and thirty-six persons voted for the subscription, and ten against it;—the whole number of qualified voters being three hundred and forty-six, two-thirds having voted for the subscription. Thereupon the subscription was made, and the bonds issued by the city authorities.

During the time of these proceedings, the Constitution of Missouri contained the following clause:

"The General Assembly shall not authorize any county, city or town, to become a stockholder in, or to loan its credit to, any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto." Article X, Section XIV, Constitution of Missouri, 1865.

The case was tried by the court without a jury.

The plaintiff offered four instructions, all of which were refused by the court. They are as follows:

PLAINTIFF'S INSTRUCTION NO. 1.

The plaintiff moves the court to decide, that if it finds from the evidence, that ordinance 621 was passed by the

Mayor and Council of the City of Louisiana, and ordinance 628, was also passed by said Mayor and Council; that the election mentioned therein was held, and with the result stated; that by authority of said ordinances, said city subscribed fifty thousand dollars to the stock of said Quincy, Alton and St. Louis Railroad Company, payable in bonds of said city, as mentioned in said ordinance 628; that said city made and deposited said bonds with coupons with an agent, as mentioned in said ordinance 628, to be delivered to said railroad company so soon as said railroad company should build and operate its road from Quincy, Ills., to a point on the east bank of the Mississippi River opposite said City of Louisiana, and thence across said river by a bridge or transfer boat upon which passenger and freight cars should be transferred into said City of Louisiana, and said railroad company should erect a depot building, and make necessary main and side tracks in said City of Louisiana for transacting the business of said railroad in said City of Louisiana, the making of said depot and tracks not to be a condition precedent to the delivery of said bonds and coupons, unless said City of Louisiana should, within 60 days from September 21, 1871, grant to said railroad company suitable and convenient grounds, with right of way, for said depot and tracks; that such grant was not made within such time; that prior to the passage of said ordinances said railroad company had promised and agreed with said City of Louisiana, in consideration of the making of said subscription, to perform all said conditions on its part, and did build and operate its road from Quincy, Ills., to the point named opposite said City of Louisiana, and thence across said river by a transfer boat on which passenger and freight cars were transferred into said City of Louisiana, and did construct said depot building and tracks in said City of Louisiana, all which was known to and accepted and received by said City of Louisiana as full and satisfactory performance of said conditions on the part of said railroad company, and afterwards said bonds and coupons (part of which coupons

are in suit in this case) were delivered to said railroad company by said City of Louisiana, or with its knowledge and consent, then the plaintiff is entitled to recover the amount of said coupons with interest from due, provided he has shown himself to be the owner thereof.

PLAINTIFF'S INSTRUCTION NO. 2.

The plaintiff moves the court to decide that, if it find from the evidence in the cause that ordinances were passed by said City of Louisiana, and an election held, and a subscription made, and contract entered into between said City of Louisiana and the Quincy, Alton and St. Louis Railroad, and bonds and coupons of said city made and deposited with an agent for delivery to said railroad company on the performance of conditions as mentioned in plaintiff's instructions No. 1, and that the grounds and right of way were not granted to the railroad company within the 60 days mentioned in said contract; and that said railroad company did build and operate its railroad from Quincy, Ills., to a point on the east bank of the Mississippi River opposite said City of Louisiana, which point was within high and low water mark on the east side of said river, and did operate its railroad from said point across said river by a transfer boat on which passenger cars and freight cars were transferred into said city, but in so operating its road did use a small portion of a track of the Chicago & Alton Railroad whereby to reach said transfer boat, and did also use a transfer boat of said Chicago & Alton Railroad to operate its road across said river, upon an arrangement between said railroads, whereby the said Quincy, Alton & St. Louis Railroad compensated said Chicago & Alton Railroad for the use of its track and transfer boat; and said Quincy, Alton & St. Louis Railroad built said depot building and constructed said tracks in said City of Louisiana as required by the contract; and said City of Louisiana, knowing that said Quincy, Alton & St. Louis Railroad so used such transfer boat and small portion of the Chicago & Alton Railroad track, assent-

ed thereto and accepted, *was* done as full performance of said conditions by said Quincy, Alton & St. Louis Railroad Company, and in consideration thereof delivered or assented to the delivery of said bonds and coupons to said railroad company, and paid without objection the first interest falling due on said bonds, the plaintiff is entitled to recover as aforesaid, provided he is the owner of the coupons in suit.

PLAINTIFF'S INSTRUCTION NO. 3.

The plaintiff moves the court to decide the law to be that if it finds from the evidence that ordinances were passed, an election held, a subscription and contract made by and between the City of Louisiana and the Quincy, Alton & St. Louis Railroad, and bonds and coupons made by said city, and deposited with an agent for delivery to said railroad company, upon conditions as mentioned in plaintiff's instruction No. 1; but said bonds and coupons (of which those in suit are part) were delivered to said railroad company without performance of said conditions, and without consent of said city, nevertheless the plaintiff is entitled to recover, provided he is the owner of the coupons in suit, if he received them in good faith, and for value, in the ordinary course of business, without knowledge of the non-performance of said conditions; and the legal presumption is he did so receive them, and the burthen of proof is on the defendant to show the contrary.

PLAINTIFF'S INSTRUCTION NO. 4.

The plaintiff moves the court to decide the law to be that if the City of Louisiana passed said ordinances Nos. 621 and 628, and held said election with the result named therein, and made the subscription, and entered into the contract with the Quincy, Alton & St. Louis Railroad, and made the bonds and coupons, and deposited them with an agent for delivery to said railroad company, on the performance of conditions, as all those matters are set forth in plaintiff's instruction No. 1; still, if the defendant delivered said bonds

and coupons to said railroad company, or assented to such delivery, without a full performance of said conditions, such conditions must now be regarded as performed, and said bonds and coupons valid and binding on said city.

The court having refused the plaintiff's instructions, proceeded further to decide, and did decide the law to be as follows, to wit:

"The pretended authority under which the subscription was made, by supposed virtue of which bonds were issued, to which bonds the coupons in suit were attached, is void under the Constitution of the State then existing. Hence it is not necessary to enter upon the inquiry whether alleged conditions precedent were or were not performed. The court holds that under the Constitution of the State of Missouri, no power was granted to or could exist in the City of Louisiana, to do what it undertook to do under the ordinances referred to.

"Therefore, as by the decisions of the Supreme Court of the United States, no power existed in the city to issue the bonds to which these coupons were attached, the bonds are absolutely void as obligations of the city, and consequently all the coupons thereto attached.

"Having reached this conclusion, it is unnecessary for the court to enter upon the issues raised by the pleadings. The court thereupon finds for the defendant, and orders judgment accordingly."

BRIEF.

The bonds in question were issued under the authority of sec. 9, of the Revised Charter of the City, Act of March 17th, 1870. See Session Acts of 1870, p. 393, which provides as follows:

"§ 9. The city shall have power to subscribe for stock in any incorporated railroad company *connecting* with the City of Louisiana, or give a bonus to any institution of learning, by submitting an ordinance making the appropriation, or authorizing the issue of bonds for any such purpose, to a

vote of the qualified voters (as provided by sec. 8) of the city, or at any special election expressly ordered; at which elections a majority of the votes cast shall be for such ordinance."

The provision made in sec. 8, is for a vote of "all resident tax payers of the city; that is to say, of all adult persons, who shall have been assessed and actually paid a tax on real or personal property for the year, or the year previous to the year in which such election shall be held; and a majority of the legal votes cast at such election, shall determine the question for, or against such ordinance. (See § 8, of the same Act of incorporation).

This is clearly in violation of the provisions of the State Constitution, which requires a vote of two-thirds of the qualified voters of the city. (See art. XIV, sec. 11, of the State Constitution).

It is admitted that, so much of § 8 and § 9 as provides for the manner of voting, and as to who shall vote, is und constitutional. But it is claimed that so much of the sections referred to may be disregarded, leaving in force only so much of § 9, as provides that a subscription may be made, and that the question of subscription may be submitted to a vote of the qualified voters of the city; and that, as a matter of fact, the question of subscription was submitted to a vote of the qualified voters, and that two-thirds of such qualified voters did vote in favor of the subscription; and that, in persuance of such vote, the subscription was made and the bonds issued.

That a legislative Act was required to authorize the issue of the bonds, there is no question made; and it is equally as clear that the Act must be in conformity with the provisions and requirements of the Constitution.

What was the legislative Act in this case?

The intention of the legislature, as to what was enacted, must prevail; for it cannot be said that anything is law which the legislature did not intend should be law. If then the legislature *intended* that the vote for the subscrip-

tion of stock and the issue of bonds should be taken in a particular way, and that voters possessing a particular qualification only should be allowed to vote, and that only a majority of the votes cast at such election should be necessary to authorize the subscription,—it can not be said that any other mode is lawful, because no other mode would give expression to the intention of the legislature, but on the contrary, would defeat it.

The 9th section in question gives the City of Louisiana the power to subscribe "by *submitting an ordinance* to a particular class of qualified voters," a majority of whom voting at such elections shall be required to make the ordinance valid. It is impossible to disconnect the power to subscribe from the mode in which the subscription is to be made, because that is the only mode in which the subscription is authorized. The legislature could not, therefore, have intended any other mode of subscription; and this mode being unconstitutional, we do not claim that the whole act is unconstitutional, because there are provisions relating to other substantive and independent matters, in regard to which the legislature clearly had the power to act, but we do claim that the provisions of § 9 can not be disconnected without destroying the manifest sense of the section, and the intention of the legislature.

An Act containing an unconstitutional provision will vitiate the whole Act, if it enters so entirely into the scope and design of the law, that it would be impossible to maintain it without the obnoxious provision. See

Reed v. Omnibus Railroad Co., 33 Cal. 212.

Also,

Warren *et al.* v. Mayor, etc. of Cambridge, 2 Gray, 34.

In this latter case Shaw, J., says: "It is no doubt true, as has been argued by the learned counsel for the prosecution of this writ, that the same Act of the Legislature may be unconstitutional in some of its provisions, and yet constitutional in others; but this must be taken with this limitation—

that the parts so held respectively constitutional and unconstitutional must be wholly independent of each other, but if they are mutually so connected with and dependent on each other as conditions, considerations or compensations for each other, as to warrant a belief that the Legislature intended them *as a whole*, and that if all could not be carried into effect, the Legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them." And to the same point see

5 Gray, 482.
Stenson *et al.* v. City of Racine, 13 Wis. 398.
State of Ohio *ex rel.*, etc. v. Commissioners of Perry Co., 5 Ohio St. 497.
Lathrop v. Mills, 19 Cal. 513.
Robinson v. Bidwell, 22 Cal. 379.
Quinton v. Rogers, 12 Mich. 168.

II. But even admitting that the section may be separated, and that after leaving out the portions admitted to be unconstitutional, so that the section will read as follows: "§ 3. The city shall have power to subscribe for stock in any incorporated railroad company connected with the City of Louisiana, * * * by submitting an ordinance making the appropriation, or authorizing the issue of bonds for such purpose, to a vote of the qualified voters of the city at any general election held in the city, or at any special election expressly ordered;"—we submit in this case the Act would be incomplete. The Constitution requires the *assent* of *two-thirds* of the qualified voters of the city, before the Legislature is authorized to provide for the subscription and the issue of bonds. This assent must be given in some legal form to be provided by the law, because it is a condition of the authority of the Legislature to make the law—the assent and the mode of assent must be provided for, or else it is not a valid constitutional act. See

St. Joseph & Denver City R. Co. v. Buchanan County Ct., 39 Mo. 485.

Wagner, J., in that case says: "A two-thirds vote was received in favor of the proposition at the election, but how many were disqualified by reason of the restriction to taxable inhabitants does not appear. The effort evidently was to conform to the constitutional requirements as to the qualifications of voters, and also to carry out the Act of the Legislature, by restricting the vote to those who are taxable inhabitants; or, in other words, to engraft the constitutional provision upon the enactment as an amendment. We think this could not be done. The Constitution, except when special provision is made for that purpose, does not enforce itself. It defines certain powers, but to make them operative, legislation is necessary."

The same constitutional provision was in force then, which we invoke in this case — so here the Legislature must provide for the mode of obtaining the assent of two-thirds of the qualified voters, which has not been done. According to the proposed reading of the section, it is only intended to submit the proposition to subscribe to a vote of the qualified voters, and it becomes necessary to invoke the provisions of the Constitution, to determine what number of qualified voters is necessary by way of amendment to the law; and so the Supreme Court of Missouri, in passing upon the provisions of Section 27, Article 12, of the State Constitution, which makes it a crime for any president, director, manager, cashier or other officer of any banking institution, to receive deposits when they know the bank to be insolvent, and then provides as follows:

"And any such officer, agent or manager, shall be individually responsible for such deposits so received, and all such debts so created with his assent—"

Held, that this last provision required legislation to enforce it.

See Fusz v. Spaunhorst, 67 Mo. 265.

The court says:

"The cases are exceptional where the constitutional provisions enforce themselves; ordinarily, the labors of the con-

vention have to be supplemented by legislation, before becoming operative."

These are the constructions given by the highest court of the State to the provisions of the Constitution of Missouri. See also the opinion of this court on a similar question.

Grover *et al.* v. Slaughter, 15 Peters, p. 500, on the construction of the Constitution of Louisiana.

The provision of the Missouri Constitution in question evidently contemplates legislation. It declares that the Legislature shall not authorize any county or city to become a stockholder, unless two-thirds of the qualified voters, at a regular or special election, shall assent thereto. The Legislature must pass an Act giving the authority to subscribe—for the Act so says in express terms; but the Act must also provide how this assent can be given and ascertained, because the authority is nugatory until the assent is given. The one is dependent upon the other.

III. But the 14th section of Art. VII, of the city charter, is relied upon; and it is claimed that this section, taken in connection with sec, 17, chap. 63, of the General Statutes of Missouri of 1865, p. 338, and sec. 2, of the Act amendatory thereof, approved March 24, 1870 (Session Acts of Mo., pp. 89-90), and when construed together, give the power to issue the bonds and make the subscription. These sections are quoted in the brief of the plaintiff in error, pp. 2 and 3. It is very evident that all the action of the city authorities, in reference to the issue of these bonds, was taken under sections 8 and 9 of the charter; and that the ordinance providing for taking a vote was passed in pursuance of the provisions of those sections.

Section 14 provides as follows:

"The city shall not at any time become a subscriber for any stock in any corporation, except as authorized by this or *some other Act of the General Assembly*; but said city may by ordinance appropriate money, etc.," and the argument is that some other Act of the General Assembly would embrace sec. 17, of chap. 63, of the General Statutes of Mis-

souri, which authorizes the County court of any county, or the City Council of any city, to subscribe for stock of a railroad company, and to issue bonds to pay the same upon a vote of two-thirds of the qualified voters; and that sec. 2, of the amendment to the general law, adopted March 24, 1870, puts foreign railroad corporations upon the same footing in this respect with corporations created by the laws of Missouri; and it is claimed, therefore, that it was carefully provided, that the power of the city to subscribe should not be confined to the special authority of the charter. If this theory be correct, it follows that the same Legislature at the same session gave two authorities to the City of Louisiana, to make subscriptions and issue bonds—one constitutional, and the other unconstitutional; and the plaintiff in error claims that the Act of March 24, 1870, was passed to relieve the people of Louisiana from the embarrassment created by the unconstitutional clauses of the city charter; but he forgets that such relief could only come, if at all, through the provisions of the 14th section above quoted, which was a part of the city charter, and adopted the same day, and in the same Act which contains these embarrassing unconstitutional provisions. But why these independent and inconsistent provisions of law? The legislature is presumed not to have intended to do a foolish or vain thing, or to have intentionally passed an unconstitutional law. They are sworn to obey the Constitution, and the legislative intention must govern in the interpretation of all laws. This is a fixed rule of interpretation, which no court will depart from. If, therefore, the apparent inconsistency between the 8th and 9th sections, and the provisions of the 14th section, can be reconciled, it must be done.

The provisions of the 9th section of the charter have reference in terms to railroad companies and institutions of learning; whereas, the 14th section "embraces "*any corporation*;" but inasmuch as two species of corporations, viz: railroad companies and institutions of learning had already been provided for, the inevitable conclusion would be

that the Legislature intended to declare that other corporations than these two should be governed by some other law, but that so far as railroad corporations are concerned, they should be governed by the previous provisions of the charter in this respect. Else why say, "*as authorized by this or some other Act of the General Assembly*?"

It was equivalent to saying, that so for as concerns the subscriptions to railroad corporations, they shall be governed by this Act; but so far as other corporations are concerned, the City of Louisiana shall not be permitted to subscribe to the stock of any such corporations, unless it is authorized to do so by the provisions of some other Act of the General Assembly. This construction would give a consistent meaning to both sections of the charter.

No one can read section 9 of the charter without coming to the conclusion that by that section the Legislature intended to declare that the city should have power to subscribe for the stock of an incorporated railroad company connecting with the city, provided a majority of the qualified voters of the city should vote in favor of such subscription, at any general or special election. The subscription was to be made "*by submitting*" an ordinance to such a vote of the people, and this intention must govern in the construction of the Act.

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